Sunshine Fleet Sdn Bhd v Jabatan Kerja Raya Malaysia & Anor (GM Healthcare Sdn Bhd & Anor, third parties)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 21NCVC-242–11 OF 2012
VAZEER ALAM J
28 FEBRUARY 2017

Contract — Indemnity — Claim for — Whether cause of action and issues raised in earlier suit similar to this suit — Whether claim against third party barred by doctrine of res judicata — Whether plaintiff adduced sufficient evidence to prove claim against third party

Contract — Termination — Wrongful termination — Whether defendant unlawfully terminated contract — Whether service proper and valid — Anticipatory breach — Extension of time — Counterclaim for damages

The plaintiffs were awarded a construction contract known as the 'Design, Construction, Equipping, Commissioning and Maintenance of Shah Alam Hospital (300) beds, Package 2, Selangor Darul Ehsan' ('the project') by the defendants. The second defendant subsequently terminated the contract via an undated letter of termination that was faxed to the plaintiff's office. The plaintiff contended that the termination by the second defendant was unlawful as the service of the letter of termination by facsimile was improper and invalid as it did not conform to the requirements to cl 54 of the conditions of contract. This allegation was denied by the defendants who stated that the contract was lawfully terminated in accordance to the terms of the contract. The issue for determination by the court was whether the second defendant lawfully terminated the contract with the plaintiff. The defendants however pleaded that flowing from the termination of the contract, the defendants had to retender the works and appoint a new contractor to complete unfinished works. The defendants claimed that because of the breach, they incurred an additional cost of RM68,530,578.45 which they claimed from the plaintiff as damages. The third party was appointed as the new subcontractor for the project following the termination of Isyoda. The plaintiff claimed against the third parties for contribution and indemnity in respect of sums found to be due from the plaintiff to the defendants in the counterclaim in such proportion as found by the court based on the liability of the third parties for the termination of the contract. The third parties submitted that the plaintiff had, prior to this claim, instituted proceedings against the third parties and Bank Rakyat ('the earlier suit') and the cause of action and issues raised in the earlier suit were

A similar to that raised in this suit and as such the third party claim herein was barred by the doctrine of res judicata.

Held, dismissing the plaintiff's claim with costs, entering judgment for the second defendant as per the counterclaim and dismissing the claim against the third parties:

B

(1) The judge found that the termination was lawful, applying the business common sense approach. The service of the notice of termination through facsimile transmission to the plaintiff, where receipt of it was acknowledged by the plaintiff, was proper service as required under cl 54 of the conditions of contract. The plaintiff had been given proper and adequate notice in writing of the defendant's intent to terminate the contract and the reasons for termination were conveyed in that notice. It was found that adequate contractual notice was given to the plaintiff via the facsimile transmission. The plaintiff's argument in respect of the service of the notice of termination lacked merit and it was rejected (see paras 5, 13 & 21–22).

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(2) The defendants had a right in law to terminate/rescind the contract on grounds of anticipatory breach under cl 54 of the conditions of contract. The defendants had established that the plaintiff had not proceeded regularly and diligently with the works, and the prospect of the works being completed within the extended contract period was rendered improbable (see para 46).

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(3) There was no substance in the plaintiff's argument that an extension of time ought to have been granted to complete the project as the reasons for the delay did not come within the grounds stipulated in cl 45 for the project director to consider an extension of time. There was also no evidence of the plaintiff making any formal application to the project director for an extension of time (see para 47).

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(4) The second defendant successfully established the counterclaim. A conclusive evidence clause shifted the burden onto the plaintiff to disprove the amount claimed. It was obvious that the plaintiff had failed to challenge or disprove the amount claimed, nor did the plaintiff show that the amount stated was manifestly wrong (see para 58).

H

(5) The cause of action and issues in the earlier suit and the present suit were similar. Thus, the cause of action against the third parties would merge into the judgment in the earlier suit. Hence, the present suit could not be maintained. The present third party action was an abuse of process as it amounted to multiplicity of suits against the third parties (see para 61).

I

(6) The plaintiff had failed to adduce sufficient evidence to establish the fact that the second third party had misrepresented the plaintiff or that the third parties had breached the terms of the deed of assignment or

collaboration agreement or had interfered in the contract between the plaintiff and the defendants (see para 63).

[Bahasa Malaysia summary

Plaintif-plaintif diawardkan kontrak pembinaan yang dikenali sebagai 'Design, Construction, Equipping, Commissioning and Maintenance of Shah Alam Hospital (300) beds, Package 2, Selangor Darul Ehsan' ('projek tersebut') oleh defendan-defendan. Defendan kedua kemudiannya menamatkan kontrak melalui surat penamatan yang tidak bertarikh yang difakskan ke pejabat plaintif. Plaintif berhujah bahawa penamatan tersebut oleh defendan kedua adalah menyalahi undang-undang kerana penyerahan surat penamatan tersebut melalui faksimile adalah tidak betul dan tak sah kerana ia tidak mematuhi kehendak klausa 54 syarat-syarat kontrak. Dakwaan ini dinafikan oleh defendan-defendan yang menyatakan bahawa kontrak adalah sah ditamatkan mengikut terma-terma kontrak. Isu untuk penentuan oleh mahkamah adalah sama ada defendan kedua secara sah menamatkan kontrak tersebut dengan plaintif. Defendan-defendan walau bagaimanapun memplid bahawa berikutan penamatan kontrak, defendan-defendan perlu menender semula kerja-kerja dan melantik kontraktor baru untuk menyiapkan kerja-kerja yang tidak siap. Defendan-defendan mendakwa oleh kerana kemungkiran tersebut, mereka menanggung kos tambahan sebanyak RM68,530,578.45 yang mana mereka tuntut daripada plaintif sebagai ganti rugi. Pihak ketiga dilantik sebgaai subkontraktor bagi projek berikutan penamatan Isyoda. Plaintif menuntut terhadap pihak-pihak ketiga untuk sumbangan dan indemniti berkaitan jumlah yang didapati kena dibayar oleh plaintif kepada defendan-defendan di dalam tuntutan balas dalam bahagian sedemikian seperti yang didapati oleh mahkamah berdasarkan liabiliti pihak-pihak ketiga bagi penamatan kontrak tersebut. Pihak-pihak ketiga berhujah bahawa plaintif telah sebelum tuntutannya, memulakan prosiding terhadap pihak-pihak ketiga dan Bank Rakyat ('saman sebelumnya') dan kausa tindakan dan isu-isu yang dibangkitkan di dalam tindakan sebelumnya adalah sama kepada yang dibangkitkan di dalam tindakan ini dan oleh itu tuntutan pihak ketiga di sini dihalang oleh doktrin res judicata.

Diputuskan, menolak tuntutan plaintif dengan kos, memasukkan penghakiman untuk defendan kedua seperti tuntutan balas dan menolak tuntutan terhadap pihak-pihak ketiga:

(1) Hakim mendapati bahawa penamatan adalah sah, dengan menggunapakai pendekatan akal perniagaan. Penyerahan notis penamatan melalui penghantaran faksimile kepada plaintif, di mana penerimaannya telah diakui oleh plaintif, adalah penyerahan betul seperti yang dikehendaki di bawah klausa 54 syarat-syarat kontrak. Plaintif telah diberikan notis bertulis yang betul dan mencukupi mengenai niat defendan untuk menamatkan kontrak tersebut dan

alasan-alasan untuk penamatan diberikan di dalam notis tersebut. Ia didapati bahawa notis kontrak yang mencukupi diberikan kepada plaintif melaui penghantaran faksimile. Hujahan plaintif berkaitan penyerahan notis penamatan kekurangan merit dan ia ditolak (lihat perenggan 5, 13 & 21–22).

(2) Defendan-defendan mempunyai hak dari segi undang-undang untuk menamatkan/membatalkan kontrak tersebut atas alasan kemungkiran jangkaan di bawah klausa 54 syarat-syarat kontrak. Defendan-defendan telah membuktikan bahawa plaintif tidak meneruskan kerja-kerja dengan kerap dan betul-betul, dan kemungkinan kerja-kerja disiapkan dalam masa tempoh kontrak dilanjutkan adalah sukar diterima (lihat perenggan 46).

(3) Tidak terdapat kebernasan dalam hujahan plaintif bahawa pelanjutan masa patut diberikan untuk menyiapkan projek tersebut kerana alasan-alasan bagi kelewatan tidak terangkum dalam alasan-alasan yang ditetapkan di dalam klausa 45 bagi pengarah projek untuk mempertimbangkan pelanjutan masa. Juga tidak terdapat keterangan yang plaintif membuat apa-apa permohonan rasmi kepada pengarah projek bagi pelanjutan masa (lihat perenggan 47).

(4) Defendan kedua berjaya membuktikan tuntutan balas. Klausa keterangan yang konklusif memindahkan beban kepada plaintif untuk menyangkal jumlah yang dituntut. Ia adalah jelas bahawa plaintif telah gagal untuk mencabar atau menyangkal jumlah yang dituntut, ataupun plaintif menunjukkan bahawa jumlah yang dinaytakan adalah jelas salah (lihat perenggan 58).

(5) Kausa tindakan dan isu-isu di dalam tindakan sebelumnya dan tindakan ini adalah sama. Oleh itu, kausa tindakan terhadap pihak-pihak ketiga akan bergabung ke dalam penghakiman di dalam tindakan sebelumnya. Maka, tindakan ini tidak boleh dikekalkan. Tindakan pihak ketiga ini adalah penyalahgunaan proses kerana ia merupakan kepelbagaian tindakan kepada pihak-pihak ketiga (lihat perenggan 61).

(6) Plaintif telah gagal untuk mengemukakan keterangan yang memadai untuk membuktikan fakta bahawa pihak ketiga kedua telah menyalahnyatakan plaintif atau bahawa pihak ketiga telah memungkiri terma-terma surat ikatan penyerahhakan atau perjanjian usaha sama atau telah campur tangan di dalam kontrak di antara plaintif dan defendan-defendan (lihat perenggan 63).]

Notes

For cases on indemnity in general, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 5837–5856.

For cases on wrongful termination, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 7110–7115.

Cases referred to

Antaios Compania Naviera SA v Salen Rederierna AB [1985] AC 191, HL (refd)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189; [1995] 3 CLJ 783, SC (refd)

Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors [1993] 2 MLJ 76, SC (refd)

Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597, FC (refd)

CIMB Bank Bhd (previously known as Bumiputra-Commerce Bank Bhd) v Zima Properties Sdn Bhd & Ors [2015] 1 MLJ 74, CA (refd)

Cadware Sdn Bhd v Ronic Corporation [2013] 6 MLJ 19, CA (refd)

Catnic Components Ltd and another v Hill and Smith Ltd [1982] RPC 183, HL (refd)

DMCD Museum Associates Sdn Bhd v Shademaker (M) Sdn Bhd (No 2) [1999] 4 MLJ 243, HC (refd)

Daya CMT Sdn Bhd v Yuk Tung Construction Sdn Bhd [2016] MLJU 352; [2016] 1 LNS 649, HC (refd)

Ellis Tylin Ltd (known as Dalkia Technical Services Ltd) v Co-operative Retail Services Ltd (1999) 68 Con LR 137, QBD (refd)

Fajar Menyensing Sdn Bhd v Angsana Sdn Bhd [1998] 6 MLJ 80, HC (refd)

Hadley v Baxendale (1854) 9 Exch 341 (refd)

Homewest Sdn Bhd v Vision Returns Sdn Bhd [2015] 11 MLJ 327, HC (refd)

Industrial & Agricultural Distribution Sdn Bhd v Golden Sands Construction Sdn Bhd [1993] 3 MLJ 433, HC (refd)

Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd [2004] 1 MLJ 401, FC (refd)

JM Hill & Sons Ltd v London Borough of Camden (1980) 18 BLR 31, CA (refd)

John v Dharmaratnam [1962] 1 MLJ 187, HC (refd)

Kerajaan Malaysia v Ven-Coal Resources Sdn Bhd [2014] 11 MLJ 218; [2014] 5 CLJ 186, HC (refd)

Lembaga Kemajuan Ikan Malaysia v WJ Construction Sdn Bhd [2013] 5 MLJ 98, HC (refd)

Malaysian Rubber Development Corp Bhd v Glove Seal Sdn Bhd [1994] 3 MLJ 569, SC (refd)

Miramar Maritime Corporation v Holborn Oil Trading Ltd [1984] AC 676, HL (refd)

Pembinaan LCL Sdn Bhd v SK Styrofoam (M) Sdn Bhd [2007] 4 MLJ 113, CA (refd)

Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360, HC (refd)

Prism Leisure Sdn Bhd v Lumut Marine Resort Bhd [2002] 5 CLJ 391, HC (refd)

Rasiah Munusamy v Lim Tan & Sons Sdn Bhd [1985] 2 MLJ 291; [1985] CLJ Rep 266, FC (refd)
Reardon Smith Line Ltd v Hansen-Tangen; Hansen-Tangen v Sanko Steamship Co [1976] 3 All ER 570, HL (refd)
SK Styrofoam Sdn Bhd v Pembinaan LCL Sdn Bhd [2004] 5 MLJ 385, CA (refd)
Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777, FC (refd)
Vital SA v Norelf Ltd [1996] 3 WLR 105, HL (refd)
Vitol BV (formerly t/a Vitol Trading BV) v Compagnie Européene des Pétroles [1988] 1 Lloyd's Rep 574 (refd)
West Faulkner Associates v The London Borough of Newham (1995) 11 Const LJ 157, CA (refd)
West Faulkner Associates v The London Borough of Newham (1993) 61 BLR 84 (refd)
Yee Hock Lai & Anor v Unity Performance Sdn Bhd & Anor [2014] 1 MLJ 187; [2013] 1 LNS 486, CA (refd)

Legislation referred to

Contracts Act 1950 s 74
Courts of Judicature Act 1964 s 11
Recorded Delivery Service Act 1962 [UK]

Jasbeer Singh Kaura (Siva Krish, Revathi Kamalanathan and Noor Shakirah Khalil with him) (Jasbeer Nur & Lee) for the plaintiff.
Nik Mohd Noor bin Nik Kar (Norazalina Razali and Dona Liyanna Sabariah bt Azmi with him) (Senior Federal Counsel, Attorney General's Chambers) for the defendants.
T Gunaseelan (BH Kaur with him) (Gunaseelan & Assoc) for the third parties.

Vazeer Alam J:

[1] The claim and counterclaim arises from allegations of breaches of contract by the parties against each other, relating to contract to design, construct, equip, commission and maintenance of the Shah Alam Hospital.

[2] The Government of Malaysia, the second defendant, had through a letter of intent dated 27 July 2006, and subsequently by a *surat setuju terima* dated 9 November 2007, awarded a construction contract known as the 'Design, Construction, Equipping, Commissioning and Maintenance of Shah Alam Hospital (300) beds, Package 2, Selangor Darul Ehsan' ('the project') for the sum of RM482,600,000 to the plaintiff. The formal contract for the project was subsequently executed between the parties and is dated 2 July 2008. The first defendant's Ketua Pengarah, who is the project manager and had executed the contract for an on behalf of the second defendant.

[3] The second defendant, through the duly appointed officer, terminated the contract on 3 September 2010. The plaintiff contends that the termination is unlawful. The plaintiff further contends that there was unlawful interference by officers of the first defendant, which according to the plaintiff was done intentionally to sabotage the plaintiff's performance of the contract. The plaintiff alleges that the lack of progress in the works was used by the second defendant to terminate the contract. Wherefore, the plaintiff claims damages and ancilliary relief.

[4] The defendants deny the allegations of unlawful interference in the plaintiff's performance of the contract and further deny the allegation of unlawful termination of the contract. The defendants state that the contract was lawfully terminated in accordance to the contract terms. The second defendant counterclaims for the sum of RM68,530,578.45 as losses and damages arising from the cost of appointing a new contractor, appointing security guards to secure the site and other matters related to the the completion of the remaining construction work.

THE FIRST ISSUE — LAWFULNESS OF THE TERMINATION

[5] Having considered and weighed the evidence, I find that the termination is lawful for the following reasons.

[6] The second defendant terminated the contract via an undated letter of termination that was faxed to the plaintiff's office on 3 September 2010 at about 3.20pm. The plaintiff admits receipt of this facsimile. The letter of termination was subsequently also delivered by AR registered post to the plaintiff on 20 September 2010. The relevant part of the letter of termination reads:

> 2.0 Dukacita diperhatikan bahawa tuan didapati tidak menjalankan kerja dengan bersungguh-sungguh dan kerja tuan dijangka tidak dapat disiapkan pada Tarikh Siap Kerja yang telah ditentukan pada 25/06/2011. Kerja tuan sepatutnya sudah 33.1% (laporan SKALA bertarikh 2/9/2010) siap tetapi kemajuan yang dicapai setakat ini adalah hanya 27.0%. Kegagalan tuan itu masih berulang sungguhpun tuan telah diberi Notis Untuk Tujuan Penamatan Pengambilan Kerja Kontraktor seperti yang tersebut di atas.
>
> 3.0 Maka sejajar dengan Fasal 54 Syarat-Syarat Kontrak, pengambilan kerja tuan adalah dengan ini DITAMATKAN.

[7] The reasons given for the termination in the letter of termination can be summarised as follows:

(a) the plaintiff had failed to proceed with the works regularly and diligently such that there was noticable lack of diligence on the part of the plaintiff;

(b) that the plaintiff had completed only 27.0% of the works when it should have been 33.1% as at 2 September 2010;

(c) the slow progress of works at site meant that the plaintiff would not be able to complete the works by 25 June 2011 which was the extended completion date;

(d) the plaintiff failed to improve on the progress of works despite the several warning 'Notis Untuk Tujuan Penamatan Pengambilan Kerja Kontraktor' having been given prior to termination; and

(e) the termination was done in accordance to cl 54 of the conditions of contract.

[8] Clause 54 of the conditions of contract reads:

> 54. Determination of Contractor's Employment
>
> 54.1 Without prejudice to any other rights or remedies which the Government may posses, if the Contractor shall make default in any one or more of the following respects, that is to say —
>
> ...
>
> (b) if he fails to proceed regularly and diligently with the performance of his obligation under the Contract;
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> ...
>
> then the officer named in Appendix 1 may give him a *notice by registered post or by recorded delivery* specifying the default, and if the Contractor shall either continue such default for fourteen (14) days after receipt of such notice or shall at any time thereafter repeat such default (whether previously repeated ir not); then the officer named in Appendix 1 may thereupon by a *notice sent by registered post or by recorded delivery* determine the employment of the Contractor under this Contract.

[9] Learned counsel for the plaintiff submits that the service of the letter of termination by facsimile on 3 September 2010 is improper and invalid as it does not conform to the requirements of cl 54 of the conditions of contract that provides for the notice to be given only by registered post or recorded delivery. Learned counsel has referred the court to the High Court decision in *Fajar Menyensing Sdn Bhd v Angsana Sdn Bhd* [1998] 6 MLJ 80 which took a strict constructionist approach of 'exact meticulous compliance' of the contract terms and held that the delivery of the notice by hand did not conform to the contractual requirement of service by registered post or recorded delivery. However, there are other cases where the courts have taken an opposing more liberal approach termed as the 'business common sense approach' and held otherwise.

[10] In *DMCD Museum Associates Sdn Bhd v Shademaker (M) Sdn Bhd (No 2)* [1999] 4 MLJ 243 Kamalanathan Ratnam J in distinguishing *Fajar*

Menyinsing held that service of a notice of termination by hand in respect of a similar contractual provision is proper service. Further in *SK Styrofoam Sdn Bhd v Pembinaan LCL Sdn Bhd* [2004] 5 MLJ 385 the High Court refused to follow the strict constructionist approach of Nik Hashim J (as he then was) in *Fajar Menyinsing Sdn Bhd* and instead preferred the business common sense approach. In doing so the learned judge had referred to decisions from various commonwealth jurisdictions and in particular had referred extensively to the decision of the English Court of Appeal in *JM Hill & Sons Ltd v London Borough of Camden* (1980) 18 BLR 31. In that case one of the issues was whether the service of the letter of termination was defective because it had been served by recorded post and not by registered post as provided under the contract. An argument that is similar to the one being canvassed by learned counsel for the plaintiff in this case. Lawton LJ in holding the service to be valid, endorsed the 'common sense' approach to the construction of the contract and rejected the 'exact and meticulous compliance with formal and procedural requirements' approach and held as follows:

> ... Without going into the authorities, it suffices to say that, in general, if one party wishes to rescind a contract or to make an election under a contract, he must make his decision known to the other side. That is a general principle and one founded on common sense, but, of course, it must not be followed slavishly if the words of a particular contract, when properly construed in their context, point to a different conclusion.
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> ...
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> In my judgment, the important word in that provision is 'served'. 'Service' means that the notice has got to be given to the other party. It cannot be 'served' on the other party until the other party has received it; ...
>
> ...
>
> All I will say about the Condition 26 point is this ... Nothing is more distasteful to me than to construe a business contract in this formalistic fashion. I think it makes a mockery of the law. To construe this contract and to treat what happened in this case between the contractors and the local authority in the way in which Mr May submits it should be treated is to make, I think, a farce of such contractual provisions ...
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> ...
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> There can be no doubt here that it never occurred to any sensible person that there was any defect whatever in the operation of Condition 26. Everybody concerned knew perfectly well what was happening. No one was in the slightest degree prejudiced by it or pretend that they were prejudiced by it or it would be believed if they did. So that it is the most purely formal point.
>
> When we come to look at the relevant provisions of Condition 26, the first point is Mr Henderson's point about whether the provision relating to registered post or recorded delivery is to be regarded as mandatory or directory. I would be very much

A disposed to construe that part of the condition (may I say) sensibly and regard it as a directory provision only, but I can appreciate there may be some difficulties about it and I say no more about it.

...

B In any event, therefore, I think, for these reasons and for the reasons given by my Lord, that that notice under Condition 26 was properly and validly given; consequently, that the plaintiffs had validly determined their employment.

[11] The decision in *SK Styrofoam Sdn Bhd v Pembinaan LCL Sdn Bhd* was C overturned by the Court of Appeal essentially on grounds of unwarranted exercise of appellate function by the High Court over a private arbitration, see: *Pembinaan LCL Sdn Bhd v SK Styrofoam (M) Sdn Bhd* [2007] 4 MLJ 113. However, the Court of Appeal in overturning the High Court's decision did not make a finding one way or the other on the issue of service of notice, ie D which of the two approaches to contractual interpretation is to be preferred. Gopal Sri Ram JCA (later FCJ) in delivering the decision of the court had held as follows:

[23] The second point is this. It has been strenuously argued that the award discloses an error of law on its face because the arbitrator did not adopt the business E commonsense approach when interpreting the service provision housed in cl 25. It is the respondent's argument that all the cases which adopted a strict approach were wrongly decided because they did not have regard to the decision in *Hill v London Borough of Camden*. It is also argued for the respondent that the arbitrator treated the decision in Hill as supporting the strict constructionist approach when that F decision is for quite the opposite view. Hence, the arbitrator therefore committed an error of law. Speaking for myself, I find it unnecessary to go into the question whether the strict constructionist approach is to be abandoned in view of *Hill*. It simply does not matter because of the facts of the present case. Here, the arbitrator not only struck down the termination notice on procedural grounds, he also found the termination to be illegal at common law.

G [24] Accept for a moment that the arbitrator misconstrued *Hill* as supporting the strict constructionist approach. Yet it matters not a jot. Because, he has held the notice bad on other grounds as well.

Thus, it appears that the High Court's common sense approach in the *SK* H *Styrofoam* case in interpreting contract clauses relating to the mode of service of the default notice was not reversed on appeal. The Court of Appeal neither endorsed nor rejected the High Court's pronouncement on the issue of service of the notice. Hence, the question was left open.

I **[12]** Mary Lim J (now JCA) in *Lembaga Kemajuan Ikan Malaysia v WJ Construction Sdn Bhd* [2013] 5 MLJ 98 in dismissing an appeal to set aside an arbitral award on grounds, inter alia, that the arbitrator had taken the strict constructionist approach on service of contractual notice, recognised the existence of these two approaches to interpretation of contract terms on service

of notices and found that the application or preference of one over the other did not amount to a curail error on the part of the arbitrator.

[13] Hence, both approaches to construction of contract have been adopted by the courts. On the facts of this case, I would prefer to apply the business common sense approach, wherein the court would be more concerned with the issue of whether the plaintiff has been given due notice of its breach rather than being preoccupied with the question of whether the defendant had complied with the strict procedure of serving the notice of determination as laid down in the contract. Such an approach to contractual interpretation seems to have been preferred by the Federal Court in *Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd* [2004] 1 MLJ 401 where Siti Norma Yaakob FCJ (later CJM) said:

> Turning now to the contract in this appeal, the provisions of cl 26(1) (a) reads as follows:
>
> > Without prejudice to any other rights and remedies which the Contractor may possess, if —
> >
> > (a) the Employer does not pay to the Contractor the amount due on any certificate within the Period from Honouring Certificates named in the Appendix to these Conditions and Continues such default for seven day after receipt by registered post or recorded delivery of a notice from the Contractor stating that notice of determination under this Condition will be served if payment is not made within seven days from receipt thereof; or
> >
> > (b) ... ;
> >
> > (c) ... ;
> >
> > (d) ...
> >
> > then the Contractor *may thereupon by notice by registered post or recorded delivery* to the Employer or Architect forthwith determine the employment of the Contractor under this Contract; provided that such notice shall not be given unreasonably or vexatiously. (Emphasis added.)
>
> *In dealing with, this particular clause in his award, the arbitrator was more concerned with the issue as to whether the respondent had complied with the procedure of serving the notice of determination as laid down in the contract. He did not direct his mind to the proviso as to whether the notice had been issued unreasonably or vexatiously. He had not subjected himself to the crucial question as to the respondent's conduct in sending the notice and in so doing had, on principles of construction, erroneously construed the provisions of cl 26(1)(a).* It is in this respect that the Court of Appeal fell into error in assuming that the arbitrator had considered the whole clause in its entirety. I say that this failure to analyse and appraise the effect of cl 26(1)(a) in its entirety, as is apparent on the face of the record, is one instance of conduct which the law does not countenance and it is this error of law that empowers me to have the award set aside, which I now do. (Emphasis added.)

[14] In fact the common sense approach preferred in *JM Hill & Sons Ltd v London Borough of Camden* (1980) 18 BLR 31 is said to be the preferred approach in England in matters of construction of commercial contracts and has become the trend — see *Ellis Tylin Ltd (known as Dalkia Technical Services Ltd) v Co-operative Retail Services Ltd* (1999) 68 Con LR 137.

[15] This approach has also found favour with the House of Lords. In *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191 (HL), Lord Diplock held that:

> ... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.

And in its earlier decision in *Miramar Maritime Corporation v Holborn Oil Trading Ltd* [1984] AC 676, the House of Lords held that in the approach to questions of construction of commercial documents:

> ... there must be ascribed to the words a meaning that would make good commercial sense.

Thus, the English position is that in interpreting commercial documents a construction that accords to business common sense must be made. Even established textbook authors such as *Hudson's Building and Construction Contracts* ((12th Ed), para 8–9 p 1118) have now come to prefer or favour this approach.

[16] In addition to that, the Court of Appeal in *Cadware Sdn Bhd v Ronic Corporation* [2013] 6 MLJ 19 (CA), affirmed that the doctrine of purposive construction, as expounded in the landmark House of Lords case of *Catnic Components Ltd and another v Hill and Smith Ltd* [1982] RPC 183 is applicable in Malaysia. And when a purposive construction is taken, it is plain and obvious that service by way of facsimile transmission is good service under the terms of contract between the parties herein. I say so for reasons that will be apparent shortly.

[17] The contract between the parties is the JKR's Standard Form of Design & Build/Turnkey Contract (PWD Form DB/T) — 2002 Ed Now, cl 54 of the conditions of contract, provides for two methods of delivery of notice. The first is registered post, by which it is clearly understood as delivery by the use of Pos Malaysia's registered postal service which comes with an accompanying acknowledgment of receipt card that records and shows proof of delivery. And the second is by way of recorded delivery, which term is not defined in the contract. What then is meant by recorded delivery? In *Fajar Menyinsing Sdn Bhd* Nik Hashim J (as he then was) held that:

> ... recorded delivery service is non-existence *(sic)* in Malaysia. In United Kingdom,

recorded delivery service exists and is a postal service provided by the post office pursuant to the Recorded Delivery Service Act 1962. Hence, the words 'recorded delivery' which appear in cl 25(1) which are adopted from the United Kingdom are meaningless in Malaysia and should be ignored. *Keating on Building Contracts* (5th Ed, 1991) at p 22 states that:

> An apparent agreement containing meaningless words may be treated in one of three ways: the meaningless words may be ignored and the rest of the clause in which they appear enforced ...

The learned judge in *Fajar Menyinsing* had in construing the meaning of 'recorded delivery' given it a historical context and held that recorded delivery must mean delivery under the mode specified in the English Recorded Delivery Service Act 1962. And as we did not have an equivalent to that Act, the learned judge had held that the words 'recorded delivery' were meaningless in that context, and thus found that the only mode of service provided in that contract is by registered post. Hence, in that case, delivery by hand was regarded as ineffective service.

[18] However, in the present case, the parties have used a different standard form contract, ie the Malaysian JKR's Standard Form of Design & Build/Turnkey Contract (PWD Form DB/T) — 2002 Ed, and there is no indication that the source of this standard form is the United Kingdom's version of it or that the draftsman had blindly adopted a contractual term from a standard form contract in the United Kingdom. Surely, a local standard form edition done in 2002, by the Malaysian JKR could not be said to contain a term of art that is peculiar to the United Kingdom, and which is meaningless in Malaysia. It is clear in my mind that the JKR's draftsman in drafting this standard form contract would not have included a term that has no meaning, more so when the High Court in as early as 1998 had pointed out that the mode of service by 'recorded delivery', in the sense of its application in the United Kingdom, is not available locally. Contracting parties are presumed to know the law that governs their contractual relationship when they negotiate and enter into the contract.

[19] I am of the opinion that the duty of the court is to construe the words used in the contract to give business efficacy to the bargain between the parties, rather than to strike down the words as bearing no meaning. Every word used in the contract must be presumed to be used by the parties intentionally and for a purpose, and the words must be given their plain and ordinary meaning. If the terms or words used can be given a meaning that would accord with the purpose for which the term is contained in the contract, then a purposive construction must be made to give effect to it. In *Vitol BV (formerly t/a Vitol Trading BV) v Compagnie Européene des Pétroles* [1988] 1 Lloyd's Rep 574, had this to say:

> The approach of the English law to questions of the true construction of contracts of this kind is to seek objectively to ascertain the intentions of the parties from the words which they have chosen to use. If those words are clear and admit of only one sensible meaning, then that is the meaning to be ascribed to them and that meaning is taken to represent what the parties intended.

That approach has been consistently applied by our courts (see *Prism Leisure Sdn Bhd v Lumut Marine Resort Bhd* [2002] 5 CLJ 391).

[20] Further, in *Reardon Smith Line Ltd v Hansen-Tangen; Hansen-Tangen v Sanko Steamship Co* [1976] 3 All ER 570 the House of Lords stated that in construing a commercial contract regard should be had to the commercial purpose of the contract and the factual background against which it had been made and specific words or terms used in the contract could be given a more liberal construction than they could as words of contractual description. The court further held that contractual words must be construed so as to signify the objects of the contract and relate to the intention of the parties.

[21] The doctrine of purposive construction of contracts entails that in the construction of a contractual term there must be ascribed to the words a meaning that would make good commercial or business sense. In this regard, in present times when it comes to mode of service of notice or documents, there are various modes that can be described as having being done by recorded delivery. Service by way of professional courier service is to my mind recorded delivery, in the sense that the delivery is recorded. In delivery by modern day professional courier service, there is usually tracking of the document or parcel from time of dispatch to the time of delivery, in some cases the tracking is real time. Likewise, when a document is hand delivered and the person making the delivery gets a written acknowledgement of receipt of the document delivered, there is some record of delivery. In these circumstances, I do not see any reason why such delivery cannot be termed as recorded delivery, for there is a record of that delivery. When the term recorded delivery is given its plain and ordinary reading, there is a sensible meaning that can be ascribed to it which gives business efficacy. I see no reason why the term recorded delivery ought to be necessarily taken to refer to a specific mode of service done by the postal authority in a foreign jurisdiction. I would go so far as to say that even electronic transmission of documents via facsimile, smart phone applications, or electronic mail over the internet, could be construed as recorded delivery for they all have some form of electronic record of delivery to the recipient. If the party transmitting the document through such electronic medium can produce proof of such record of delivery or if there is acknowledgement of receipt of that transmission, as is the case here, then it would in my view amount to recorded delivery. Hence, to that extent, I would hold that the service of the notice,

through facsimile transmission on 3 September 2010 to the plaintiff, where the receipt of it is acknowledged by the plaintiff, is proper service as required under cl 54 of the conditions of contract.

[22] In any event, what is of importance is that the plaintiff has been proper and adequate notice in writing of the defendant's intention to terminate the contract pursuant to cl 54, and the reasons for the termination has also been conveyed in that notice. The key issue is not how the notice was served but the fact that it was served. As such, I find that adequate contractual notice has been given to the plaintiff via the facsimile transmission on 3 September 2010. In any event, the plaintiff has admitted receipt of the notice of termination dated 3 September 2010, as well as the receipt of the said notice vide AR registered post on 20 September 2010. The fact of the receipt of the notice of termination is apparent from the plaintiff's conduct in appealing the defendant's decision to terminate vide the plaintiff's letter dated 29 September 2010. It must be gainsaid that the plaintiff did not question nor protest the mode of delivery of the notice of termination at that time and in fact replied vide letters of 20 September 2010 and 29 September 2010. The plaintiff did not protest then and thus cannot be heard to protest now. Therefore, I find that the plaintiff's argument in respect of the service of the notice of termination lacks merit and I have accordingly rejected it.

[23] Now, I shall move on to consider the substantive issues raised by the plaintiff. The first and most important of the substantive issues is the question of whether the second defendant through the first defendant had wrongfully terminated the contract. As noted above, the termination is done under cl 54.1(b) of the conditions of contract, ie on grounds that the plaintiff had failed to proceed regularly and diligently with the performance of its obligations under the contract. The notice of termination is signed by Dato' Sri Prof Ir Dr Judin bin Abdul Karim, ie the Ketua Pengarah Kerja Raya, of the first defendant. There is no dispute as to his authority to issue the notice of termination under the conditions of contract. The issue is confined to the question of whether the plaintiff had failed to proceed regularly and diligently with the performance of its obligations under the contract.

[24] A good starting point to answer this question would be to look at the meaning attributed to the term 'regularly and diligently'. In the English case of *West Faulkner Associates v The London Borough of Newham* (1993) 61 BLR 84; 31 ConLR 105, the court in interpreting the said phrase held as follows:

> In the light of the judgments, text books and expert evidence, I conclude that 'regularly and diligently' should be construed together and that in essence they mean simply that contractors must go about their work in such a way as to achieve their contractual obligations. This requires them to provide sufficient and proper

materials and to employ competent tradesmen, so that the works are fully carried out to an acceptable standard and that at all time, sequence and other provisions of the contract are fulfilled.

And at the Court of Appeal in *West Faulkner Associates v The London Borough of Newham* (1995) 11 Const LJ 157, Simon Brown LJ said:

> What particularly is supplied by the word 'regularly'; is not least a requirement to attend for work on a regular daily basis with sufficient in the way of men, materials and plant to have the physical capacity to progress the works substantially in accordance with the contractual obligations. What in particular the word 'diligently' contributes to the concept is the need to apply that physical capacity industriously and effeciently towards the same end. Taken together, the obligation upon the contractor is essentially to proceed continuously, industriously and effeciently with appropriate physical resourcesso as to progress the works steadily towards completion substantially in accordance with the contractual requirements as to time, sequence and quality of work.

[25] The learned authors of *The PAM 2006 Standard Form of Building Contract,* Sundra Rajoo, Dato' WSW Davidson and Ir Harbans Singh KS (Lexis Nexis, 2010 Ed), after having considered the above two case authorities and also the commentary by *Chappell, Marshall, Powell-Smith and Cavender in Building Contract Dictionary* (3rd Ed) pp 348–349, have in a non-exhaustive manner summarised at p 556 of their book the circumstances where:

> ... it can be said that the contractor is generally not proceeding 'regularly and diligently' with his Works under a narrow range of circumstances, which include, inter alia, the following:
>
> (i) where he removes his labour and plant from the site (see *JM Hill & Sons Ltd v London Borough of Camden* (1980) 18 BLR 31);
>
> (ii) where the contractor is substantially behind schedule and it is factually obvious that even with the deployment of realistic levels of resources and/or the acceleration of works, the contractor will not be able to meet the contract Completion Date(s); or
>
> (iii) where the original contract completion has lapsed with no realistic chnace of any extension and the contractor's performance is so seriously below par with little or no possibility of reaching acceptable levels; and
>
> (iv) circumstances as highlighted previously in the definition of the phrase in *Building Contract Dictionary* 3rd Edn by Chappell, Marshall, Powell-Smith and Cavender.

[26] I find these cases and commentaries to be useful guides in my determination of the issue in the present case. And as pointed out by the learned authors of *The PAM 2006 Standard Form of Building Contract*:

> The core elements of this performance default necessitate the establishment on a balance of probabilities by the employer that:

(1) there is a failure on the contractor's part; and

(2) the said failure is in relation to proceedings regularly and diligently with the Works.

As such, the burden of proof lies on the defendants to establish the fact of the plaintiff's failure to proceed with the works regularly and diligently.

[27] The evidence shows that the Shah Alam Hospital had two separate phases of development. The first, Package 1, was for the earthworks, and the second, Package 2, was for the design and build of the 300 bed hospital. Both packages were awarded to the plaintiff. We are now concerned with Package 2. The plaintiff was given possession of the project site on 15 November 2007. The contract period was 36 months from possession of site and as such the original contractual completion date for the project was 14 November 2010.

[28] The defendant's first witness Ir Mohamed Amin bin Kassim ('DW1'), who was at the material time employed by the first defendant as the project site officer and was tasked with supervising the project implementation in accordance to the contract terms, testified that there was delay in the project works and an extention of time ('first extention') was granted vide certificate of delay and extension of time No 1 dated 22 October 2008. The plaintiff was granted an extension of 90 days and the extended completion date was 12 February 2011. This extension was given on grounds of a policy decision made by the second defendant to ensure that projects implemented under the Ninth Malaysia Plan are not delayed by reason of increases in prices of building materials and fuel cost.

[29] DW1 further testified that despite the first extension of time, the plaintiff's progress of works on site was very slow. The first defendant issued a *surat peringatan lewat kerja* dated 12 May 2009, wherein the plaintiff was notified as follows:

> 2.0 Adalah dimaklumkan bahawa mengikut catatan skala bertarikh 04 Mei 2009, bacaan sistem kawal dan lapor telah mencatatkan kelewatan sebanyak 48 hari dimana unjuruan kerja sebenar sebanyak 12.3% berbadning jadual 16.7%.
>
> 3.0 Pejabat ini memandang serius kelewatan yang melebehi 1 bulan kerana ini mempengaruhi perlaksanaan projek yang dijangka siap pada 12hb Februari 2011.
>
> 4.0 Tuan dengan ini diberi PERINGATAN PERTAMA untuk melaksanakan segala kerja-kerja pembinaan ditapak. Sila kemukakan recovery plan sebelum atau pada 19hb Mei 2009 bagi memastikan projek ini siap pada tarikh yang ditetapkan.

[30] The first defendant, vide certificate of delay and extension of time No 2 dated 11 June 2009, granted a second extension of time ('second extension') for

133 days on grounds that there was delay in procuring the approval for the water reticulation works and road junction works. Therefore, the new extended completion date was 25 June 2011.

[31] The plaintiff forwarded a recovery plan to the first defendant vide letter dated 13 August 2009. The first defendant under cover of letter dated 18 September 2009 approved the revised works program submitted by the plaintiff and agreed that it shall be basis for the project's onwards implementation.

[32] However, the plaintiff failed to adhere to their own works program, and there was continued and persistent delay in the works. The first defendant then issued the second *surat peringatan lewat kerja* dated 15 July 2010, wherein the following is stated:

> 2.0 Adalah dimaklumkan bahawa mengikut Laporan SKALA bertarikh 01 July 2010, bacaan sistem kawal dan lapr telah mencatatkan prestasi kerja tuan telah kelewatan sebanyak 18 hari dimana kemajuan kerja sebenar ialah 26.7% berbanding jadual 29.1% untuk kerja yang telah disiapkan sehingga 10hb Jun 2010.
>
> 3.0 Sehubungan dengan para 2.0, prestasi kerja tuan mengikut laporan SKAL bagi 3 bulan terakhir ialah seperti berikut:-
>
> 3.1 Kemajuan Kerja sehingga 29hb April 2010 LEWAT 1 hari.
>
> 3.2 Kemajuan Kerja sehingga 21hb Mei 2010 LEWAT 3 hari.
>
> 3.3 Kemajuan Kerja sehingga 17hb Jun 2010 LEWAT 18 hari.
>
> 4.0 Kami memandang serius ke atas kelewatan tuan kerja terus meningkat dan ini akan mempengaruhi perlaksanaan projek yang dijadualkan siap pada 25hb Jun 2011.

[33] DW1 states that following that letter, there was some improvement in the progress of works but it was still short of the targets stated in the works program. More alarming was the fact that work at site had stopped completely and there was a drastic reduction of workers on site. The first defendant then issued a *surat amaran bagi kemungkiran kontraktor* dated 26 July 2010 wherein the following was stated:

> 2.0 Dukacita diperhatikan bahawa tuan didapati tidak menjalankan kerja dengan bersungguh-sungguh dan kerja tuan dijangka tidak dapat disiapkan pada Tarikh Siap Kerja yang telah ditentukan pada 25 Jun 2011. Kerja tuan sepatutnya sudah 29.7% siap tetapi yang kemajuan yang dicapai setakat ini adalah hanya 26.1%. Kegagalan tuan itu masih berlanjutan sungguhpun tuan telah diberi peringatan melalui surat kami yang dirujuk diatas. Aktiviti kerja di tapak telah terhenti dan bilangan pekerja adalah amat kurang dengan ketara berbanding bulan-bulan sebelum ini. Pada hari ini (26 Julai 2010), hanya terdapat 41 orang oekerja ditapak, dinama sepatutnya adalah lebih kurang 700 orang pekerja. Keadaan ini adalah amat kritikal dan serius.

3.0 Tuan adalah dinasihatkan untuk meneruskan kerja serta merta menjalankan kerja dengan bersungguh-sungguh agar projek ini dapat disiapkan dalam tempoh yang ditetapkan.

4.0 Sila tuan berikan sebab-sebab yang munasabah mengapa perjalanan kerja telah tergantung serta masalah-masalah yang dihadapi dan tindakan yang akan diambil untuk mengatasi masalah-masalah tersebut.

5.0 Sekiranya tuan gagal mematuhi perkara di atas, Pejabat ini akan mengambil tindakan sewajarnya selaras dengan Syarat-syarat Kontrak.

[34] Despite the *surat amaran* dated 26 July 2010, there was still no appreciable acceleration in the works and the first defendant issued a second *surat amaran bagi kemungkiran kontraktor* dated 4 August 2010, wherein the plaintiff was notified that the progress of work is only 26.7% when it should be 29.7%, and more alarmingly only 16 workers were on site when it should be at least 700 and that works had come to a complete stop. Once again the plaintiff was instructed to proceed with diligence to accelerate the works to ensure that it is completed by the extended completion date. Obviously, in the one month since the first *surat amaran bagi kemungkiran kontraktor* dated 26 July 2010 was issued, there has been negligible improvement in the works progress, thus leading to the issuance of the second *surat amaran* on 4 August 2010. Needless to say the situation on site was far from satisfactory as works had completely stopped.

[35] The plaintiff vide its letter dated 6 August 2010 replied to the first *surat amaran* dated 26 July 2010 wherein the plaintiff informed the first defendant that the reason for the slow progress of works and delay was the dispute between the plaintiff, its subcontractor GM Healthcare Sdn Bhd ('the first third party') and the financier Bank Rakyat, which was mired in several legal suits between them at the Shah Alam and Kuala Lumpur High Courts. In one of those suits the High Court had given an injunction order against the first third party and Bank Rakyat, wherein the plaintiff's project account at Bank Rakyat had been frozen and that had according to the plaintiff affected cash flow for the project. This had apparently affected payments to subcontractors and suppliers which resulted in the works coming to a stand still. The plaintiff further informed the first defendant that they were in the midst of appointing fresh specialist contractors and suppliers, and in this regard asked for two weeks to present a new work program.

[36] The first defendant being concerned with the situation at site, ie that work had come to a complete stop since July 2010, issued the requisite notice under cl 54 of the conditions of contract — *notis untuk tujuan penamatan pengambilan kerja kontrak* dated 11 August 2010 to the plaintiff. In that notice, the plaintiff was notified as follows:

Dukacita diperhatikan bahawa tuan didapati tidak menjalankan kerja dengan bersungguh-sungguh dan kerja tuan dijangka tidak dapat disiapkan pada Tarikh Siap Kerja yang telah ditentukan pada 25/06/2011. Kerja tuan sepatutnya sudah 29.7% (2hb Ogos 2010) siap tetapi kemajuan yang dicapai setakat ini adalah hanya 26.1%. Kegagalan tuan itu masih berulang sungguhpun tuan telah diberi amaran melalui surat dirujukan bil (28)dlm. PKR(CKK)CM2/4.0/B/1/2 Jld bertarikh 26hb Julai 2010.

2.0 Perlakuan tuan sedemikian sangatlah mendukacitakan. Perlakuan tuan bukan sahaja akan melewatkan penyiapan kerja ini tetapi juga akan mengakibatkan kesusahan kepada orang ramai.

3.0 Tuan adalah dikehendaki menjalankan kerja tuan dengan lebih cergas lagi. Sekiranya tuan gagal mematuhi kehendak perenggan ini dalam tempoh 14 hari selepas penerimaan notis ini atau dalam tempoh yang munasabah, pengambilan kerja tuan di bawah Kontrak ini akan ditamatkan sejajar dengan Fasal 54 Syarat-syarat Kontrak.

4.0 Tuan adalah diingatkan iaitu sekiranya pengambilan kerja tuan ditamatkan, kerja akan disiapkan sejajar dengan Fasal 54.3 Syarat-syarat Kontrak dan segala perbelanjaan berlebihan yang timbul hendaklah ditanggung sespenuhnya oleh pihak tuan.

That notice dated 11 August 2010 was sent by AR registered post and received by the plaintiff on 12 August 2010.

[37] The plaintiff replied the aforesaid notice of 11 August 2010 vide letter dated 16 August 2010, wherein the plaintiff stated that they have terminated their sub contract with the first third party and were in the process of appointing a new subcontractor and new suppliers and that the process is expected to take some time. In this regard, the plaintiff asked for further time.

[38] The plaintiff sent a further letter dated 23 August 2010 in reply to the aforesaid notice dated 11 August 2010 wherein the plaintiff stated the following:

2. Dimajukan bersama surat ini Plan Tindakan Pemulihan(Recovery Plan) beserta dengan 'Milestone Project'. Harap dapat pihak tuan ambil perhatian bahawa mengikut perancangan semula CPM kami masa yang diperlukan untuk menyiapkan keseluruhan projek ialah kira-kira 22.5 bulan lagi, termasuk tempoh peralihan semula dan memperuntukan 6 bulan tempoh 'T&C'. Ini bermakna kami akan memerlukan masa tambahan berjumlah 11.5 bulan lagi selepas tamat tempoh kontrak pada 26hb Jun 2011. Ini adalah berdasarkan justifikasi seperti berikut:

2.1 Sehingga hari ini Ogos 2010 tempoh kontrak telah berlalu selama 33 bulan. *Mengikut perancangan skala kemajuan kerja sepatutnya telah mencapai 32.64% tetapi keadaan sebenar hanya mencapai 27.03% iaitu 5.61% lewat atau bersamaan 73 hari. Adalah dijangkakan kelewatan sehingga bulan September akan mencecah 146 hari.*

2.2 *Prestasi kerja ditapak mula merosot dari semenjak bulan Mac 2010 lagi. Dan berhenti sepenuhnya pada akhir Julai 2010.*

2.3 *Kegagalan ini adalah disebabkan kepincangan Pengurusan Kewangan dimana pihak pekerja dan sub kontraktor-sub kontraktor kecil dan juga pembekal tidak mendapat bayaran sepenuhnya dan kebanyakkannya telah tertunggak 3 hingga 4 bulan*. Ini adalah berpunca daripada salah laku/salah tadbir 'Tabung Projek' yang diurus oleh Bank Rakyat. Walaupun semua tuntutan bayaran kemajuan telah dibayar oleh JKR melalui Bank Rakyat Malaysia, tetapi wang tersebut telah disalah tadbir/guna oleh sub kontraktor utama menyebabkan bayaran yang sepatutnya dibayar kepada pekerja dan sub-kontraktor-sub-kontraktor kecil dan juga pembekal tidak dilakukan. Campur tangan pengurusan Akaun Projek oleh Bank Rakyat sendiri telah menambah burukkan lagi keadaan.

2.4 *Kami terpaksa menamatkan kontrak kami dengan semua sub-kontraktor pada 11 Ogos 2010 dan memulakan proses pengstrukturan semula organisasi dan pengurusan tapak*. Dari tarikh tersebut kami memerlukan selama 2 bulan lagi memproses aktiviti pra-kontrak, kelulusan bahan, menyusun serta melantik semula sub-kontraktor-sub-kontraktor dan pembekal disamping menyelesaikan masalah berhubung dengan perundangan dan akaun bank penerima bayaran.

2.5 *Kami merencanakan kerja-kerja ditapak dapat aktifkan semula pada Oktober 2010 dan dijangka akan mengambil masa selama 3 bulan bagi mendapatkan momentum sepatutnya. Dari tarikh tersebut iaitu bulan Januari 2011 sehingga Disember 2011 iaitu selama 11.5 bulan diperlukan untuk menyiapkan semua kerja-kerja struktur, infrastruktur, akitektur, mekanikal, letrik, peralatan perubatan serta perabut lerai*.

2.6 Mulai pertengahan Disember 2011 kerja-kerja 'testing & commissioning' serta handover dapat dijalankan penyerahan sepenuhnya pada Jun 2012.

[39] The first defendant in the meantime replied the plaintiff's letter dated 6 August 2010 vide their letter of 26 August 2010 wherein the first defendant informed the plaintiff that no concrete proposals have been forthcoming from the plaintiff to overcome the delay in works. The first defendant further informed that despite the plaintiff's promise to forward a revised work program within two weeks, none had been forwarded. Thereafter, on 3 September 2010 the first defendant issued the notice of termination pursuant to the provisions of cl 54 terminating the contract.

[40] Procedurally, I find that the first defendant has followed the contract terms in bringing the contract to an end. And substantively, I am also satisfied

that the defendants have established on a balance of probabilities that the plaintiff has failed to proceed regularly and diligently with the works. In fact the plaintiff had admitted that works had started to slow down since March 2010 and had come to a complete stand still in July 2010. The uncontroverted documentary evidence, supplemented by the oral testimony of DW1, shows that as of 10 August 2010 there were no workers at site. The plaintiff did not have a single worker at site as of that date. The plaintiff had vide letter dated 23 August 2010 also informed the first defendant that they were mired in financial problems and were in the midst of appointing a new subcontractor to carry out the works. The plaintiff intended to recommence with the works sometime in October 2010 and expected to complete the project sometime in June 2012. This request was unacceptable to the first defendant. Following the first third party's termination as subcontractor, the works at site had stopped and there were no workers on site. Obviously, the work on site had been carried out entirely by the first third party and not the plaintiff, otherwise the plaintiff's workers and machinery on site could have carried on with the works. The plaintiff was proposing to restart works in October 2010 and sought an extention of time till June 2012 to complete the project. The plaintiff's own admission is that the financial problems occassioned by the dispute with Bank Rakyat and the first third party had to be overcome in order to proceed with the works. When the facts and circumstances of the case are considered by reference to the case law and to the commentary by Chappell, Marshall, Powell-Smith and Cavender in *Building Contract Dictionary* (3rd Ed) pp 348–349, it seems obvious to me that the plaintiff cannot be said to have proceeded with regularity and diligence in carrying out the works. The learned authors therein had opined that the phrase 'regularly and diligently' means:

> ... more than an express restatement of the contractor's common law obligation as to progress ie it must bear some relationship to the specified date of completion and his progress must be constant, systematic and industrious. Whether or not the contractual standard is achieved is probably best judged objectively having regard to such matters as:
>
> ° The number of men retained on site compared to the number one would expect to be needed by a competent and experienced contractor faced with the same relevant commitments.
>
> ° The plant and other equipment employed on the work in relation to the type and volume of work to be undertaken in the time available for completion.
>
> ° The progress actually being made on the site relative to the volume and complexity of the work still to do achieve contractual completion.

Thus, when the facts of the case are objectively tested against the above observations of the learned authors, it is clear to me that the plaintiff's progress of work was not constant, systematic and/or industrious.

[41] The plaintiff further contends that the termination is premature because the extended completion date was 25 June 2011 and there were still nine months left for the plaintiff to complete the works. The plaintiff argues that it ought to have been given time until the extended completion date to complete the project and thus submits that the termination on 3 September 2010 is premature and in breach of contract. In support of this contention, learned counsel for the plaintiff has referred to the cases of *Kerajaan Malaysia v Ven-Coal Resources Sdn Bhd* [2014] 11 MLJ 218; [2014] 5 CLJ 186; and *Homewest Sdn Bhd v Vision Returns Sdn Bhd* [2015] 11 MLJ 327. I accept the general proposition that when a contract is subsisting, any premature termination is wrongful, unless there is anticipatory breach. In *Homewest Sdn Bhd* the defendant terminated the contract before its expiry on 31 May 2013 and argued that the termination was lawful as the plaintiff had failed to proceed with due diligence and had stopped work on the site since April 2013. The High Court found that the defence could not stand as the defendant had failed to plead this defence. Thus, on that ground See Mee Chun J held that the contract was wrongly and prematurely terminated. Similarly, in *Ven-Coal Resources Sdn Bhd*, the defence of failure to proceed with regularity and diligence failed on the facts and the court held the termination to be unlawful.

[42] I would agree that, on the facts of these two cases, the courts were correct in their finding that the termination of the contract before the completion date was wrongful. However, in the present proceedings, the plea of failure to proceed with regularity and diligence has been specifically taken by the defendants and the facts of the case seem to support that plea, as will be seen shortly. In any event, of importance to the present determination of the issues is that in both these cases the courts recognised the principle of anticipatory breach and the right of the employer to terminate the contract if the contractor does not proceed regularly and diligently such that it is obvious that the works could not be finished by the completion date.

[43] My learned brother Lee Swee Seng J had expressed this principle very eloquently in *Daya CMT Sdn Bhd v Yuk Tung Construction Sdn Bhd* [2016] MLJU 352; [2016] 1 LNS 649, where in doing so he had referred to the observation of the learned author IN Duncan Wallace QC in *Hudson's Building and Engineering Contracts* (11th Ed Vol 1), London, Sweet & Maxwell, 1995 at para 4.128 as follows:

> ... In addition to express provisions for completion by a stated date, virtually all construction contracts, for very good practical reasons, also contain provisions requiring due diligence or expedition by the contractor at all times prior to completion. Thus, the English standard forms provide that the contractor 'shall ... regularly and diligently proceed with the (works) ... but in fact, even in the absence of such provisions, it is submitted that there must be an implied term that the contractor will proceed with reasonable diligence, although no doubt, *in cases where a completion date is stipulated in the contract, the degree of required progress will be*

measured against the prospects of completion by that date. The reason for this latter implied term, it is submitted, is that, otherwise, an owner will be forced to stand by helpless until the perhaps distant completion date, notwithstanding a rate of progress clearly inadequate to achieve the promised date and certain to cause irremedial future loss to the owner.

[44] When the law is applied to facts of the case, I am unable to accept the argument of learned counsel for the plaintiff that the termination is premature for the simple reason that when it becomes obvious to the employer that the contractor is unable to complete the works before the completion date, then the employer would have a right in law to bring the contract to an early end. This can be termed as the right of one contracting party to terminate the contract prematurally when there is anticipatory breach by another party (see *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597 (FC); *Industrial & Agricultural Distribution Sdn Bhd v Golden Sands Construction Sdn Bhd* [1993] 3 MLJ 433 (HC); and *Rasiah Munusamy v Lim Tan & Sons Sdn Bhd* [1985] 2 MLJ 291; [1985] CLJ Rep 266 (FC)) for an exposition on the right of an innocent party to terminate the contract on grounds of anticipatory breach, whether or not the time for performance is due (see: *Vital SA v Norelf Ltd* [1996] 3 WLR 105). See also the learned discourse on the subject by Ir Harbans Singh KS in *Harbans' Engineering and Construction Contracts Management — Law and Principles* (2nd Ed), para 4.44 at p 181.

[45] My learned brother Lee Swee Seng J in *Daya CMT Sdn Bhd* in dismissing an argument that the termination of the construction contract before the completion date on grounds of failure to proceed regularly and diligently with the works was unconscionable had observed:

> It must be appreciated that the peculiar and potentially problematic properties of a construction contract is such that upon failure of a contractor to proceed regularly and diligently with the works, the employer may give a notice to rectify breach and thereafter to terminate the contract. In other words, *the employer does not have to wait until after the completiondate is over before his right to terminate arises. Otherwise the employer would have to endure what may be a painfully slow progress in the works, unrealistically hopeful against hope that the contract would be completed on time when every bit of evidence points to the contrary*.

[46] Clause 41.3 of the conditions of contract provides that time shall be the essence of this contract. There is overwhelming evidence showing that the plaintiff would be unable to complete the works by the extended completion date on 25 June 2011. There was no realistic prospect of the plaintiff accelerating the works to catch up with the revised work program. In fact the plaintiff in its letter of 23 August 2010, which I have reproduced above in extenso, has admitted that they have stopped work and that they would be 146 days behind schedule as at September and that they were unable to complete

the works by the extended completion date of 25 June 2011 and that they would require time until June 2012, ie another 11.5 months to complete the works. Even then this timeline would have only been possible if the plaintiff recommenced works in October 2010 by the appointment of new subcontractors and suppliers, the prospect of which looked rather bleak at that time. Clearly the evidence was overwhelmingly stacked against the plaintiff, and the inevitable conclusion was that the plaintiff had failed to proceed regularly and diligently. Therefore, in light of the fact that the defendants have established that the plaintiff has not proceeded regularly and diligently with the works, and the prospect of the works being completed within the extended contract period being rendered improbable, I would hold that the defendants have a right in law to terminate/rescind the contract on grounds of anticipatory breach under cl 54 of the conditions of contract.

[47] The plaintiff further argues that it is entitled to an extension of time to complete the project and as such submits that the termination of the contract is unlawful. Learned counsel for the plaintiff submits that when a contract contains a clause that time is of the essence and provides for liquidated damages as a remedy for delay, the court will normally treat time as not being the essence. Learned counsel has referred to the case of *Yee Hock Lai & Anor v Unity Performance Sdn Bhd & Anor* [2014] 1 MLJ 187; [2013] 1 LNS 486; and *Kerajaan Malaysia v Ven-Coal Resources Sdn Bhd* [2014] 11 MLJ 218; [2014] 5 CLJ 186. However, it must be noted that in the *Ven-Coal Resources* case, though the superintending officer had found the request for extension of time of 189 days reasonable, he did not allow the request for extension of time. This the learned judge found was unconscionable and thus the termination for want of diligence was found to be misplaced and unlawful. In the present case the contractual stipulation as regards delay and extension of time is found in cl 45 of the conditions of contract. The onus is on the plaintiff to apply to the project director for an extension of time on grounds stipulated in cl 45. The plaintiff knew very well that the project needed to be completed on time as it involved an important public health amenity. Despite the considerable delay in the works, there is no evidence at all of the plaintiff ever making any formal application to the project director for an extension of time. Post issuance of the several warning letters to improve on diligence, the plaintiff in its reply merely informed the first defendant that the plaintiff was involved in a legal tussle with the first third party and Bank Rakyat, and sought time to find a replacement subcontractor to carry on with the work and also to sort out the court cases. These reasons for the delay do not come within the grounds stipulated in cl 45 for the project director to even consider an extension of time, let alone grant one. Hence, I find that there is no substance in the plaintiff's argument that an extension of time ought to have been granted to complete the project.

A **[48]** The plaintiff also alleges that the first defendant's project manager, Mohd Ariff bin Abu Bakar ('Ariff'), had unlawfully interfered in the contract by directing the plaintiff to appoint the first third party, owned by the second third party, as the subcontractor to replace the earlier subcontractor, Isyoda (M) Sdn Bhd ('Isyoda'). Initially, the plaintiff had appointed Isyoda as B subcontractor for the project. Subsequently, the plaintiff and Isyoda entered into a mutual termination agreement dated 21 May 2009 ('the said MTA') by the terms of which, the parties mutually agreed to terminate the services of Isyoda as subcontractor. The plaintiff then appointed the first third party as the subcontractor. The plaintiff's main witness, YAM Tg Putri Arafiah bt Sultan C Abdul Aziz Shah ('PW3') testified that Ariff did not force the plaintiff but had merely recommended that the first third party may be appointed as subcontractor when the plaintiff was faced with difficulties with Isyoda. Thus, the evidence at trial was at variance with the plaintiff's pleaded case. In fact, learned counsel for the plaintiff seems to have abandoned this allegation in his D written submissions, and instead changed tack and submitted that the interference with the contract came when the first defendant had dealt with the first third party directly thus interfering with the progress of works. I do not find any merit in this assertion. Ariff has since passed on, thus the first E defendant was not able to directly rebut this allegation. However, when the overall evidence is considered, I do not find any evidence of interference from the first defendant's officers in the plaintiff's relationship with its subcontractors or suppliers. The problems and issues between the plaintiff and the first third party and/or Bank Rakyat has nothing to do with the first F defendants. In fact PW3 had confirmed in her testimony that the injunction, which the plaintiff had obtained in another suit, restraining the first third party from operating the project account at Bank Rakyat, had affected the plaintiff's and the first third party's ability to pay other subcontractors and suppliers, which in turn had affected the progress of the works. The evidence shows G persistent delay in the execution of the works and the first defendant had issued the several notices and warnings in accordance to the contract stipulations. Despite these warnings there were no discernable improvement. If in fact there was intereference by officers of the first defendant, the plaintiff ought to have raised it in writing when the warning letters were issued. However, the plaintiff H failed do so. Thus, this complaint strikes me as an afterthought for there is not a single document in evidence showing that the plaintiff had raised this allegation of interference by the first defendant's officers when the notices and warnings to accelerate the works were issued or at anytime before or immediately after the notice of termination was issued. Thus, I do not find I anything untoward in the first defendant's conduct in the management of the contract and there is no cogent evidence to support this allegation.

[49] In the overall, I find that the plaintiff has failed to prove its pleaded case, and thus, I dismissed the plaintiff's claim with cost.

THE DEFENDANTS' COUNTERCLAIM

[50] I shall now move on to consider the defendants' counterclaim. The defendants plead that flowing from the termination of the contract, the defendants had to retender the works and appoint a new contractor to complete the unfinished works. The defendants claim that as a result of this breach they had incurred additional cost of RM68,530,578.45, which they now claim from the plaintiff as damages.

[51] The starting point regarding this part of the case is s 74 of the Contracts Act 1950, which is in effect the statutory embodiment of the common law rules enunciated in the celebrated English case of *Hadley v Baxendale* (1854) 9 Exch 341 at p 354; 156 ER 145 at p 151:

> ... where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed.

And s 74 of the Contracts Act 1950 that states:

(1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

(2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Thus, in accordance to s 74 of the Contracts Act 1950, the second defendant, as the innocent party who has suffered from the plaintiff's breach, is entitled to receive compensation for any loss or damage naturally arising from the breach (see: *Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors* [1993] 2 MLJ 76 at pp 87–91).

[52] The Federal Court in *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777 held that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover (see also *John v Dharmaratnam* [1962] 1 MLJ 187 (HC); *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 (HC); and *Malaysian Rubber Development Corp Bhd v Glove Seal Sdn Bhd* [1994] 3 MLJ 569 (SC)).

[53] Juxtaposed to that law is cl 54.3(e) of the conditions of contract which provides the second defendant's right to claim for loss and damage arising from the termination of the contract under cl 54.1 of the conditions of contract.

Clause 54.3(e) provides that:

> In the event of the Contractor's employment under this Contract being determined under sub-clause 54.1 or 54.2 hereof irrespective of the validity of such determination —
>
> ...
>
> the Contractor shall allow or pay to the Government in the manner hereinafter appearing the amount of any loss and/or damage cused to the Government by the determination of his employment under this contract. If or as soon as the arrangements for the completion of the Works made by the Government enable the P.D. to make a reasonably accurate assessment of the ultimate cost to the Government of completing the Works *following the determination of the Contractor's employment and the engagement of other contractors or persons, the P.D. may issue a certificate stating the amount of such loss and/or damage caused to the Government by such determination of the Contractor's employment*. Such certificate shall state separately the sums previously paid to the Contractor by the Government, the sums paid or due or to become due to other Contractors or persons engaged by the Government to complete the Works, any sums paid to sub contractors or suppliers under paragraph (c) hereof and any costs or expenditure incurred or to be incurred including On-cost charges calculated by applying the Percentage of On-cost charges stated in Appendix 1 to the cost or expenditure incurred, by the Government in completing the Works, (all such costs herein referred as 'Completion Cost'). The certificate shall also state the final Contract Sum which, allowing for any variations or other matters which would have resulted in an adjustment of the original Contract Sum and for any other sums, which the Government might be entitled under the terms of the Contract to deduct there from, would have been payable under the Contract had the Contractor's employment not been determined and if the Final Contract Sum is less than the Completion Cost, *the difference shall be a debt payable by the Contractor to the Government. This certificate shall be binding and conclusive on the Contractor as to the amount of such loss and/or damage specified therein*;

[54] The defendants' witness, Sr Raja Zaiton bt Raja Adam ('DW3'), testified that in this case the project director had in accordance to cl 54.3(e) issued the 'Perakuan Kos Penamatan' dated 21 February 2013 certifying that a sum of RM68,530,578.45 is payable by the plaintiff. DW3 explained that following the termination of the contract, the works were retendered and awarded to Gadang Engineering Sdn Bhd and the project was completed at the total cost of RM561,593,242.47, which was an increase of RM78,993,242.47 from the original contract price of RM482,600,000. The defendants had deducted from this differential sum the amount of RM9,580,380.02 being the forfeiture of the deposit sum and a further sum of RM882,284 which was due to the plaintiff. Thus, the net loss sustained by the second defendant was RM68,530,578.45.

[55] Apart from arguing that the testimony of the DW3 is heresay by virtue of her non-involvement in the contract between the parties and its termination, there is no credible challenge to the validity and veracity of the *perakuan kos penamatan* itself. In any event, I do not find any substance in the argument of learned counsel for the plaintiff that the evidence of DW3 is heresay or inadmissible. DW3 is a quantity surveyor and was at the material time the Ketua Penolong Pengarah Kanan, Bahagian Kerja Perubatan & Kesihatan, Cawangan Kontrak & Ukur Bahan, at the first defendant's headquartersin Kuala Lumpur. DW3 was the person who prepared the *sijil perakuan bayaran muktamad* for the project and was well versed with all the cost elements. She explained the contents of the *perakuan kos penamatan*, which by agreement of parties was a Part B document. The second defendant has through the evidence of DW3, established the fact that the cost of completing the project had in fact increased as a result of the retendering of the contract and appointment of Gadang Engineering as the new contractor. Further, it is evident that this increased cost arose directly from the plaintiff's breach of contract. And, the increased final cost of completing the project is something which is foreseeable and within the contemplation of parties and as such comes well within the legal principles embodied in s 74 of the Contracts Act 1950.

[56] The *perakuan kos penamatan* is final and conclusive evidence as provided in cl 54.3(e). This clause also provides that the sum certified as due and payable to the second defendant shall be a debt due from the plaintif to the second defendant, as such it is a also certificate of indebtedness. Clause 54.3(e) is specifically worded as to its nature and intent such that it operates as a conclusive evidence clause.

[57] The Court of Appeal in *CIMB Bank Bhd (previously known as Bumiputra-Commerce Bank Bhd) v Zima Properties Sdn Bhd & Ors* [2015] 1 MLJ 74 held that:

> It is axiomatic that a certificate or statement issued pursuant to a conclusive evidence clause is, in the absence of fraud or manifest error on the face of the certificate, determinative of the amount due. In *Bache & Co (London) Ltd v Banque Vernes et Commercial De Paris* [1973] 2 Lloyd's Rep 437 (Bache) Lord Denning MR said at p 440:
>
> > I would only add this: this commercial practice (of inserting 'conclusive evidence' clauses) is only acceptable because the bankers or brokers who insert them are known to be honest and reliable men of business who are most unlikely to make a mistake. Their standing is so high that their word is to be trusted. So much so that a notice of default given by a bank or a broker must be honoured. It ranks as equivalent to, if not higher than, the certificate of an arbitrator or engineer in a building contract. As we have repeatedly held, such a certificate must be honoured, leaving any cross-claims to be settled later by an arbitrator. So if a banker or broker gives a notice of default in pursuance of a 'conclusive

A evidence' clause, the guarantor must honour it, leaving any cross-claims by the customer to be adjusted in separate proceedings.

The above articulation of the rationale underlying the legal acceptance of conclusive evidence clauses was approved in the Federal Court cases of *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282 and *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685; [2006] 3 CLJ 544. *The highest court of the land had decided that a certificate of indebtedness operates in the field of adjectival law, and it excuses the bank from adducing the proof of debt. It is for the borrower to disprove the amount claimed.*

C **[58]** Hence, a conclusive evidence clause, such as in cl 54.3(e), would shift the burden onto the plaintiff to disprove the amount claimed, and when the evidence is considered, it is obvious that the plaintiff has failed to challenge or disprove the amount claimed in the *perakuan kos penamatan*, nor did the plaintiff show that the amount stated in the certificate is manifestly wrong. D Thus, I find that the second defendant has successfully established the counterclaim. Hence, judgment is entered for the second defendant for the sum of RM68,530,578.45 together with interest and cost. Interest shall be at the rate of 5%pa from date of judgment. Cost for the claim and counterclaim is fixed at RM100,000 to be borne and paid by the plaintiff.

E

THE THIRD PARTY CLAIM

[59] Following the termination of Isyoda as subcontractor, the plaintiff states that it was introduced to the second third party by En Ariff, and upon the F recommendation of En Ariff, the plaintiff appointed the second third party's company, ie the first third party, as its new subcontractor for the project. The plaintiff states that the appointment of the first third party as the subcontractor was by way of a letter of undertaking dated 10 January 2009 issued under the hand of the second third party offering the plaintiff a part of the profits to the G directors of the plaintiff if the sub contract is awarded to the first third party. The plaintiff and the first third tarty subsequently entered into a master collaboration agreement dated 8 October 2009 setting out the terms of collaboration. The arrangement between the parties was that all the project works would be carried out by the first third party to completion, and in this H regard the first party obtained financing facilities from Bank Rakyat in the sum of RM64.13m. The plaintiff executed a deed of assignment dated 16 July 2009, wherein and the plaintiff agreed that all interim payments from the first defendant would be paid into a project account in Bank Rakyat operated jointly by the plaintiff and the first third party, and Bank Rakyat was authorised I to deduct the periodic repayment for the loan and thereafter channel the remainder of the monies to a joint account in the name of the plaintiff and the first third party held in Maybank Islamic Bank. The plaintiff states that any transfer of funds from the Maybank Islamic Bank joint account would require the consent of the plaintiff. The plaintiff alleges that in respect of the interim

payments Nos 24, 25 and 26, Bank Rakyat without the consent of the plaintiff, and in breach of the terms of the deed of assignment, had after deducting the repayments for the loan, released the balance to the first third party's account in Asian Finance Bank. The plaintiff states that it had written to Bank Rakyat objecting to this release of funds without its consent. The plaintiff further states that Bank Rakyat had in disregard of the plaintiff's objection similarly transferred the balance payments after deduction for the loan repayment to the first third party's account in Asian Finance Bank in respect of interim payments No 27, 28, 29, 30, 31 and 32. Thus, in para 37 of the statement of claim, the plaintiff pleads that 'tindakan-tindakan GM Healthcare, Elvin Toh dan Bank Rakyat ini telah mengakibatkan pihak Plaintif menghadapi masalah aliran wang tunai untuk menyempurnakan pembinaan Hospital tersebut mengikut jadual yang ditetapkan oleh pihak Defendan Pertama'. Further, at para 40 of the statement of claim, the plaintiff pleads that as a result of the financial problems faced by the plaintiff, the workers, subcontractors and suppliers were not fully paid. Additionally, the plaintiff states that the first and second third party had sabotaged the project by issuing statements that were not true and that all these unlawful acts had contributed to or resulted in the termination of the contract by the first defendant. Hence, the plaintiff claims against the first and second third party for contribution and indemnity in respect of any sums found to be due from the plaintiff to the defendants in the counterclaim in such proportion as found by the court based on the liability of the first and second third party for the termination of the contract.

[60] Learned counsel for the third parties submits that the third party claim is unsustainable because the plaintiff had prior to this claim instituted proceedings against the third parties and Bank Rakyat in the Kuala Lumpur High Court vide Civil Suit No 22–520 of 2010 and has obtained judgment. The learned counsel further submits that the cause of action and issues raised in the earlier suit is similar to that raised in this suit and as such the third party claim herein is barred by the doctrine of res judicata.

[61] Having perused the pleadings in the earlier suit and the judgment of the court in that suit, and comparing it with the pleadings herein, I find that the cause of action and issues are indeed similar. Thus, I would agree with learned counsel for the third parties that the cause of action against the third parties would merge into the judgment in the earlier suit. Hence, this suit cannot be maintained. The present third party action is an abuse of process as it amounts to multiplicity of suits against the third parties (see: *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783).

[62] Further, s 11 of the Courts of Judicature Act 1964 provides the High Court:

A Power to dismiss or stay proceedings where the matter in question is res judicata between the parties, or where the matter in question is res judicata between the parties, or where by reason of multiplicity of proceedings in any court or courts the proccedings ought not to be continued.

B The third parties had initially applied to intervene in this suit and sought to be added as co-defendants. However, that application was dismissed on grounds of objections raised by the plaintiff. The plaintiff then brought the third party action after the defendants filed the counterclaim. Clearly, this was act of self preservation. If this claim is allowed, then it would amount to a double claim by the plaintiff.

C

[63] Now, even if the doctrine of res judicata did not apply, I find that the plaintiff has failed to adduce sufficient evidence establishing the fact of the second third party misrepresenting the plaintiff or the fact of the third parties having breached the terms of the deed of assignment or collaboration agreement or having interfered in the contract between the plaintiff and the defendants. The plaintiff's principal witness, PW2, could hardly recollect importants facts to support the allegations against the third parties and in fact gave incoherent testimony as regards the allegations made against the third parties.

D

E

[64] Thus, I find that the claim against the third parties is unsustainable and dismissed the same with cost of RM20,000.

F *Plaintiff's claim dismissed with costs; judgment entered for second defendant as per counterclaim; claim against third parties dismissed.*

Reported by Fatin Mohd Ismail

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